

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:KYT:NAS:TL-N-5026-99
HPLevine, ID# 62-09574

date:

AUG 30 1999

to: Chief, Examination Division, Kentucky-Tennessee District
Attention: Revenue Agent John Lovelace

from: District Counsel, Kentucky-Tennessee District, Nashville

subject: [REDACTED] & Subsidiaries
Proper party in post-merger to sign statute extension

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

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ISSUES:

1. Which taxable period controls the statute of limitations for the taxpayer for the [REDACTED] period where there is a net operating loss carryback from a subsequent period?
2. Which is the proper party to execute a statute extension where the corporation was merged into another corporation and its corporate existence terminated?

CONCLUSIONS:

1. Where there is a net operating loss carryback from a subsequent period, either the taxable period for the year in which the carryback originated or the year in which the losses were carried back to, whichever is longer, controls the statute of limitations for the taxpayer for the [REDACTED] period with respect to adjustments up to the amount of the carryback. To the extent that some of the adjustments are based on the [REDACTED] income tax return or items carried forward, recurring from or based on earlier years, the [REDACTED] limitations period is controlled solely by the [REDACTED] statute of limitations.
2. The proper party to execute a statute extension where the corporation was merged into another corporation and its corporate existence terminated is the successor entity. To extend the statute for the carryback adjustment, the proper period would be either the originating carryback year and the proper entity would be the parent of the successor subsidiary if a consolidated return was filed, or the year in which the loss was carried back to, in which case the proper entity will be the successor entity.

FACTS AND DISCUSSION:

You have the [REDACTED] return under examination. [REDACTED] merged with [REDACTED], a subsidiary of [REDACTED] ([REDACTED]) on or about [REDACTED].¹ According to the terms of the merger plan and agreement, [REDACTED] would be the surviving corporation and the separate existence of [REDACTED] would cease. A net operating loss was incurred in the short-year final return filed by [REDACTED], which it seeks to carryback to [REDACTED].² There may also be issues for pre-merger periods which impact the [REDACTED] taxable year.

¹ Although the merger agreement was entered into on or about [REDACTED], we understand that the merger occurred on or about [REDACTED], due to normal due diligence and other matters necessary to effectuate the merger.

² We understand that the merger occurred immediately following the close of the [REDACTED] short-year.

Statutes of limitation and refund:

Under I.R.C. §§ 6501(h) and 6511(d)(2), the period of limitation for a net operating loss (refund and assessment) is determined by the period attributable for the year in which the carryback originated. Therefore, to the extent that the refund is based on the net operating loss, the statute of limitations is controlled by the later period. Similarly, the Internal Revenue Service can make adjustments up to the carryback amount within the same statute of limitations period. I.R.C. § 6501(h) has however been held to be an expansion of and not a limitation to the regular statute of limitations. The statute for [REDACTED] can independently be held open by a statute extension agreement entered into for that year for all adjustments including the net operating loss carryback. See Centennial Sav. Bank FSB v. United States, 887 F.2d 595 (5th Cir. 1989), *affd.* in part and *revd.* in part on other grounds 499 U.S. , 111 S.Ct. 1512 (1991); Calumet Industries, Inc. v. Commissioner, 95 T.C. 257 (1990); and Schneer v. Commissioner, T.C. Memo. 1993-372.

Proper party to execute a consent:

The validity of a consent and the capacity of a party to enter into a consent is determined by State law. Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985). Under Delaware law, which is the State of incorporation for both [REDACTED] and [REDACTED], the successor corporation in a merger succeeds to and is liable for the debts and liabilities of the acquired corporation as if the successor corporation itself incurred them. See Southern Pacific Transportation v. Commissioner, 84 T.C. 387 (1985); Malone & Hyde, Inc. v. Commissioner, T.C. Memo. 1992-661; and Rev. Rul. 59-399, 1959-2 C.B. 488.³ Consequently, [REDACTED] as the successor merger corporation is the proper entity to extend the statute of limitations.

In order to clearly reflect the return and period for which a consent is sought, we suggest that the caption concerning the entity for whom the statute is being extended on the Form 872 be reflected as "[REDACTED] and Subsidiaries, as successor to [REDACTED] & Subsidiaries." We also suggest that the employer identification number of [REDACTED] be reflected in the caption since that is the income tax return being extended

³ We presume that you have verified that the transaction occurred as represented in the agreement and plan of merger. If not, then you may want to determine which documents were filed with the Delaware Secretary of State to effectuate the merger and terminate [REDACTED]'s legal existence and review them.

and that the employer identification number of [REDACTED] be included after its name.⁴

Since a common parent's authority to act for an agent for the consolidated group arises on a year-to-year basis (see Treas. Reg. § 1.1502-77(a); Interlake Corp. v. Commissioner, 112 T.C. No. 10 (1999); and Southern Pacific Transportation v. Commissioner, supra at 401), the entity acting as the common parent must be the common parent in the year under consideration. [REDACTED] was not a member of the [REDACTED] consolidated group in [REDACTED], and therefore, [REDACTED] as the parent of [REDACTED] is not the proper party to sign the consent for [REDACTED].

To extend the statute of limitations for the carryback adjustments, the statute extension can be signed by the entity whose liability created the carryback, which in this case was also [REDACTED], and therefore, a statute extension can also be signed by [REDACTED] for the [REDACTED] period which will likewise serve to protect the carryback statute of limitations.

[REDACTED] was a parent entity for the [REDACTED] period, and [REDACTED] as the successor entity will be the parent for the [REDACTED] period. It has the authority to act as the sole agent for the group for the consolidated return year under Treas. Reg. § 1.1502-77(a), and alternatively, as an alternative agent under Treas. Reg. § 1.1502-77T(a)(4) since [REDACTED] was the common parent for all or part of the year.⁵

⁴ The [REDACTED] income tax return was filed in the name of [REDACTED] & Subsidiaries, while the agreement and plan of merger refers only to [REDACTED]. We presume that to the extent that [REDACTED] had subsidiaries, then they became subsidiaries of [REDACTED]. In that instance, [REDACTED] as the parent can bind the subsidiaries. You may want to determine the extent that [REDACTED] had subsidiaries and the disposition of the subsidiaries in the merger. To the extent that the subsidiaries were divested before the merger or that the subsidiaries did not follow [REDACTED] into [REDACTED], as discussed below, [REDACTED] should be able to bind the subsidiaries which are no longer part of the common parent although there could be certain hazards involved. See and compare Interlake Corp. v. Commissioner, 112 T.C. No. 10 (1999) and Craigie, Inc. v. Commissioner, 84 T.C. 466 (1985). This determination may also affect the proper party entitled to claim the carryback and receive the refund. See Interlake Corp. v. Commissioner, supra.

⁵ Since the acquired consolidated group (in this case, [REDACTED]) did not continue in existence, the transaction was not

Proper person to sign the statute extension:

The statute extension should be signed by an authorized officer of [REDACTED]. The Internal Revenue Service applies the rules applicable to the execution of the original returns to the execution of statute extensions. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. I.R.C. § 6062 provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Therefore, the statute extension should be signed by one of these officers of [REDACTED]. Should you need to determine the current officers, you can acquire this information from the latest corporate by-laws and most recent corporate minutes. Accordingly, the statute extension should be signed by [Name of corporate officer, Title of corporate officer, [REDACTED] & Subsidiaries.]

Please contact the undersigned at (615) 250-5072 if you have any questions. Attached is a client survey which we request that you consider completing. The client survey is an attempt to measure your satisfaction with the service provided by this office. We expect to be able to use your response to improve the services that we provide to you. We are closing our file subject to reopening if additional assistance is requested.

JAMES E. KEETON, JR.
District Counsel

By:

HOWARD P. LEVINE
Senior Attorney

Attachment:
Client survey